In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 473

PAUL W. HEISEY,

Appellant,

vs.

COUNTY OF ALAMEDA; CITY OF OAKLAND; RUSSELL C. HORSTMANN, as County Assessor of Alameda County; ROGER COIT, as County Treasurer of Alameda County; EDWIN MEESE, JR., as County Tax Collector of Alameda County; CHESTER STANLEY, as Chairman of the Board of Supervisors of Alameda County; CLIFFORD RISHELL, as Mayor of the City of Oakland; THE ROMAN CATHOLIC WELFARE CORPORATION OF SAN FRANCISCO, Intervenor,

Appellees.

APPELLANT'S BRIEF OPPOSING THE DEFENDANT-APPELLEES' MOTION TO DISMISS.

Appeal from the Supreme Court of the State of California.

INTRODUCTION.

Almost all of the points raised in defendants' brief were covered in far more detail in intervenor's brief. Since we have prepared a comprehensive answer to these points in our brief in opposition to intervenor-appellee's motion to dismiss, we refer to that brief and confine ourselves here to a few of defendants' most glaringly erroneous statements and arguments.

ARGUMENT.

I. APPELLANT HEISEY PRESENTS VITAL QUESTIONS FOR REVIEW UNDER THE FIRST AND FOURTEENTH AMENDMENTS. DEFENDANTS HAVE FAILED TO SHOW THE LACK OF SUBSTANTIALITY.

A. DEFENDANTS FAIL TO ANSWER APPELLANT'S CONTENTION THAT FORCED TAX SUPPORT FOR AND USE OF THE TAX SYSTEM TO PROMOTE SECTARIAN EDUCATION THROUGH EXEMPTION SUBSIDIES PRESENTS A SUBSTANTIAL QUESTION UNDER THE FIRST AMENDMENT.

1. The fallacious argument that our colonial history of religious school exemptions makes such subsidies constitutional.

Defendants assert that parochial school tax exemptions are constitutional because they existed in the states when the Federal Constitution was adopted.

Defendants forget, however, that church-state unity and even state-supported religious intolerance were also widespread at that time. Pfeffer, *Church, State & Freedom,* 106. "Public" education was then often the complete servant of the state established sect. Cubberly, *Public Education in the United States,* 44-45. Colonial school tax exemptions were therefore merely

an integral part of the whole religious establishment picture. *The Franklin Street Society v. Manchester,* 60 N.H. 342.

In 1789 there were state establishments of religion. There were state taxes for the support of religion. There were state-supported religious schools. And there were tax exemption subsidies for the state-supported religious schools.

This historical "evidence" pertaining to the practices of some *state* governments certainly furnishes no proof that the First Amendment endorsed such practices. To the contrary, the First Amendment was adopted for the very purpose of preventing *Congress* from pursuing such practices at the *Federal* level. And it was not until the historic *Everson* and *McCollum* cases that the power of the "establishment of religion" clause was brought to bear against *state* governments.

The truly "historical" approach, then, would be to see what oppressive European and Colonial *State* practices brought about the adoption of the *Federal* prohibition against "establishment of religion." With such an approach, one would necessarily observe that sectarian educational subsidies were part and parcel of the oppressive practices. Pursuing history further, one would observe that religious establishments gradually began to disappear at the state level—except in some areas of education. And one would then conclude, as does Simpson in *The Exemption of Property from Taxation in the United*

States, 18 Minn. L. Rev. 411, 416-419, that the reason for sectarian school subsidies disappeared with the elimination of religious establishments.

One would observe still further, however, that in later years the advocates of church-state unity have focussed their efforts almost exclusively on the field of education. As Mr. Justice Jackson points out at 330 U.S. 1, 63:

> "Two great drives are constantly in motion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made. One is to introduce religious education and observances into the public shools. The other, to obtain public funds for the aid and support of various private religious schools."

These comments are borne out by the many recent examples of near-mergers of the public and Roman Catholic school systems. See *Zellers v. Huff,* 55 N.M. 501, 236 P. 2d 949 (1951); *Berghorn v. Reorganized School District No. 8,* 260 S.W. 2d 573 (Mo., 1953); *Wooley v. Spalding,* (Kentucky Ct. of Appeals, Oct., 1956) *State ex rel. Johnson v. Boyd,* 28 N.E. 2d 256 (Ind., 1940); Cf. *Visser v. Nooksack Valley School Dist.,* 33 Wash. 2d 699, 207 P. 2d 198.

History, then, today finds us armed with the First Amendment as an effective implement to protect against religious establishments at the state level. It also finds us faced with a new and growing "establishment" problem in the field of education. As the Supreme Court of New Mexico stated in *Zellers v. Huff,* supra, 236 P. 2d 954:

> "New Mexico had a Roman Catholic school system supported by public funds within its public school system."

This newly-highlighted form of oppression—arising long after the Federal Constitution was adopted and only after the non-sectarian public school system had become a part of our American way of life—certainly cannot be abrogated by looking to our history of colonial religious establishments for precedent. Instead it must be met by understanding that the history of colonial religious establishments and subsidies gave rise to the very constitutional amendment which today can protect us against a rapidly increasing form of the same tyranny.

2. The fallacious argument that sectarian school exemption subsidies are universal today and that this supposed universality makes such subsidies constitutional.

Defendants also contend that no substantial question has been presented because of the supposed universality of parochial school exemption subsidies in the states today.

The first answer to this so-called "universality" argument is that in California—where the people have long been free to express themselves through the initiative and referendum processes—such exemption subsidies were repeatedly rejected until the invalid legislative assumption of power in 1951. Parochial school tax exemption subsidies have always been clearly prohibited by the California Constitution under the provisions of Article XIII, Sec. 1, and Article IV, Sec. 30. Its courts and taxing authorities had so ruled

prior to this case. And proposed *constitutional* amendments allowing such exemption subsidies were *resoundingly defeated* by the California electorate in the elections of 1926[1] and 1933.[2] Thus in California, the tyrannical burden of forced tax exemption subsidies for sectarian schools has long been understood and uniformly rejected by the people. The 1952 referendum presented a far different problem. At that time, a *legislative* referendum on the 1951 Revenue and Taxation Code Amendment was presented to the people under the omnibus "religious, hospital or charitable purposes" category. Posters and advertisements circulated throughout the state depicted *crippled children* beseeching the voters—"Don't tax our schools." This despite the fact that 88% of the affected children were Roman Catholic school children. Even under such circumstances, however, the referendum squeaked through with a margain of only 77,477 out of a total 4,804,533 votes cast. And it can still be said that *never* have the people of this state adopted a constitutional amendment expressly authorizing tax exemption subsidies for private, undercollegiate schools of any kind.

The second answer to the "universality" argument is that tax exemption subsidies for religious schools are neither universal nor uniform in other states to-

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[1]The proposed constitutional amendment appeared on the 1926 ballot as Proposition No. 11 and was defeated by a vote of two to one.

[2]The proposed constitutional amendment appeared on the 1933 ballot as Proposition No. 4 and was defeated by a vote of eight to five.

day. In fifteen states, there are express limitations on the acreage or dollar value of school property that may be exempted.[3] In many states, there are explicit requirements that the schools be open to all the public on an equal basis.[4] In others, there are provisions for state supervision of curriculum and teachers' credentials.[5] In still others, there are requirements that tuition be free,[6] that the institution be incorporated in the exempting state,[7] and that the institution meet certain educational specifications.[8] In Connecticut, it was long held that such schools served no public purpose whatever and, therefore, were not entitled to an exemption.[9] And these are only a few of the limitations found in the various states. See 2 *Cooley on Taxation,* Sec. 770 (4th Ed.), 1924, pp. 1598-1601.

The final answer is—and defendants concede this to be true—that such parochial school exemption subsidies have almost never been challenged in the courts. One undoubted reason is that forced public aid

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[3]Alabama, Indiana, Iowa, Kansas, Maine, Maryland, Mississippi, New Hampshire, New Jersey, Oklahoma, Rhode Island, South Carolina, Washington, West Virginia, and Wisconsin.

[4]E.g., Georgia; Ohio (*Bloch v. Board of Tax Appeals,* 114 Ohio St. 414, 59 N.E. 2d 145, *Society of Precious Blood v. Board of Tax Appeals,* 77 N.E. 2d 459, *American Committee of Rabinical College v. Board of Tax Appeals,* 76 N.E. 2d 719); Texas; and Washington.

[5]E.g., New Hampshire.

[6]E.g., Delaware.

[7]E.g., Michigan, New Jersey.

[8]E.g., Colorado, Virginia, and Wisconsin.

[9]*Stamford Jewish Center, Inc. v. Stamford,* 117 Conn. 379, 168 Atl. 5; *Female Academy of the Sacred Heart,* 108 Conn. 136, 142 Atl. 678; *Pomfret School v. Town of Pomfret,* 105 Conn. 456, 136 Atl. 88.

through tax exemption is an easily obscured, seldom observed, and deceptive form of subsidy. *Brainard v. Town of Colchester,* 31 Conn. 407, 410.

3. The erroneous contention that exemption subsidies can be equated with neutrality toward religious schools and therefore do not constitute a direct and substantial aid to sectarian education.

Defendants confuse the issue still further by pointing to the declaration of this court in *Zorach v. Clauson,* 343 U.S. 306, 314, that the First Amendment does not require "hostility" to religion. Defendants assert that the abolition of religious school subsidies would constitute hostility and urge that neutrality is all that is required.

We agree that neutrality is the test. But this neutrality means *neutrality,* not something less, just as separation means *separation,* not something less.

We cannot agree that the granting of an annual tax exemption subsidy of almost one million dollars to Roman Catholic parochial schools—or to any religious schools—constitutes neutrality. It is a substantial subsidy. Hunter, *Tax Exemptions—A Subsidy,* 8 Tax. Mag. 332, 351. It is a form of direct state aid for sectarian education devoutly sought after by the Roman Catholic Hierarchy. The Roman Pontiff himself declares that more than neutrality is desired—in fact required. In Encyclical Letter of December 31, 1929, *On Christian Education of Youth, Four Great Encyclicals,* Paulist Press, p. 64, Pope Pius XI states that "distributive justice *requires" aid* for education *in Catholic schools from public funds.* Moreover, the

Roman Catholic Hierarchy think of this aid as a special *privilege* which they would deny to other sects where they are in the ascendancy in a particular state. In Ryan and Boland, *Catholic Principles of Politics* (1952), page 320 the authors declare in this basic text for Roman Catholic Colleges:

> "[W]hat then would be the proper course of action for a Catholic State? Apparently, the latter State could logically tolerate only such religious activities as were confined to the members of the dissenting group. It could not permit them to carry on general propaganda nor accord their organization certain *privileges* that had formerly been extended to all religious corporations, *for example, exemption from taxation.*" (emphasis ours)

When we talk of tax exemption for sectarian schools we are therefore in no sense talking about state neutrality. We are talking about state *aid.* We are talking about a *privilege.* And in California, we are talking about a million dollar annual *subsidy.* Whatever characterization of exemptions is used, we can safely say that non-exempt taxpayers will be compelled to *bear an added tax burden and acquiesce in state promotion of private sectarian schools.* Even the majority opinion of the California Supreme Court talks of *promotion* of education, and *benefit* for sectarian schools. It does not argue that mere neutrality is involved.

B. DEFENDANTS LIKEWISE FAIL TO ANSWER APPELLANT'S CONTENTION THAT THE FORCED EXEMPTION SUBSIDIES ALSO PRESENT SUBSTANTIAL QUESTIONS UNDER THE EQUAL PROTECTION AND DUE PROCESS CLAUSES.

Defendants' entire treatment of these points is confined to less than one and one-half pages. (See Defendants' Brief, pp. 8-9.) Our extended discussion of these points in our answer to intervenor's brief should therefore suffice.

We do wish to point out, however, that defendants fail to support their contention that the equal protection and due process questions are not open here. Defendants concede that the Fourteenth Amendment issues were raised in the pleadings. They concede that we argued these points before the California Supreme Court in innumerable briefs, oral argument, and on petition for rehearing. But they rely only on the fact that the majority of the Supreme Court failed to discuss the latter points in their opinion. However, as we point out in our Statement as to Jurisdiction, these points are preserved by reason of having been raised below and having been tacitly rejected when the California Supreme Court upheld that validity of the statute. See *Largent v. Texas,* 318 U.S. 418.

Defendants irresponsibly reject appellant's equal protection and due process arguments.

Appellant Heisey *is* within the class unreasonably discriminated against because he is compelled to support public schools where indoctrination of his sectarian beliefs is forbidden and yet is also forced to support private, sectarian schools where the sectarian

doctrines of *others* are infused into and permeate the entire teaching program.

On the due process point, it is true that five justices of this court rejected the argument that legislation facilitating a private *secular* education serves no public purpose. However, as the evidence in this case shows, and as our reply to intervenor's brief discusses at length, the evidence in this case proves that so-called "secular" education in Roman Catholic schools is forbidden and is a myth.

Defendants attempt to deal with questions 4 and 5 as "state law" questions, but as we point out in our answer to intervenor's brief, the challenged action violates fundamental concepts of ordered liberty and may be challenged under both the due process and equal protection clauses for reasons made clear by the three dissenting justices of the California Supreme Court.

The exclusion of evidence showing a violation of the Federal Constitution is clearly a question which this court may consider as the cases we cite in our reply to intervenor demonstrate. Thus defendants' contention on question 7 is similarly unsupported.

II. DEFENDANTS HAVE FAILED COMPLETELY TO DEMONSTRATE THAT APPELLANT HAS NO STANDING TO SUE.

Defendants' arguments at pages 10 to 13 are no different whatsoever from those of intervenor. We therefore rely on our reply to intervenor's brief to answer the points defendants raise.

We do wish to emphasize three points here, however:

1. It is *clear* from the evidence in this case that many thousands of dollars in taxes will be lost each year by Alameda County alone as the result of parochial school exemptions. This loss of tax revenue is certain. It was proved, AND THE LOSS OF A SOURCE OF TAX REVENUES AMOUNTING TO TENS OF THOUSANDS OF DOLLARS ANNUALLY IS UNQUESTIONABLY A DIRECT POCKETBOOK INJURY.

2. As the courts have stated again and again, it is a matter of common sense that whatever deficit there is in the fiscal budget due the county for any given year by reason of exemptions of property is cast as an additional burden upon the other taxpayers. *Commonwealth v. Thomas,* 119 Ky. 208, 83 S.W. 572, 573; *Eyers Woolen Co. v. Town of Gilsum,* 24 N.H. 1, 146 Atl. 511.

3. In any event, all three trial judges in this case found from the evidence that the taxes lost under the exemption here will be cast upon plaintiff and the other taxpayers of the county and said taxes will thus be borne by plaintiff and these taxpayers.

Thus whether we are talking about a threatened increase in taxes or simply an assured loss of tax revenues, the threatened pecuniary injury to city and county taxpayers is direct, immediate and measurable, and sustains the jurisdiction of this court where such local taxpayers are suing.

Defendants wrongly assert that appellant Heisey's entry into this appeal was by an *ex parte* proceeding and that there was no showing of Heisey's status as an aggrieved taxpayer. We simply refer to Appendices A, B and C attached to our brief in opposition to intervenor's motion to dismiss, and also to appendix D of the statement as to jurisdiction.

CONCLUSION.

For these reasons it is therefore respectfully submitted that the motion of defendants to dismiss should be denied.

Dated, San Francisco, California,
November 13, 1956.

Respectfully submitted,
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